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CLERK

No. 84-1273.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

REGENTS OF THE UNIVERSITY OF MICHIGAN,
PETITIONER,
v.
SCOTT E. EWING,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief of Duke University, President and Fellows of Harvard College, The Johns Hopkins University, Northwestern University, The Washington University and Yale University
Amici Curiae.

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Amici Curiae.

Interest of *Amici Curiae*.

The *amici* are major private universities that are engaged in teaching and research in numerous disciplines, including medicine. In each of the six universities, faculty members play a central role in setting and administering academic standards, and in the medical schools of the six universities faculty review committees similar to the University of Michigan's ("Michigan") determine the academic qualifications and status of medical students.

This case involves important questions concerning the ability of judges to overturn university decisions on the academic status of students. Assessing academic qualifications is at the core of the teaching process, and traditionally educators have exercised this function free of external influence and intrusion. The *amici* believe that the continuation of this principle is vital to the preservation of excellence in higher education in general, and in medical education in particular, and to the continued independence of institutions of higher education in academic matters.

The lower court held that Michigan, a public university, denied respondent Scott E. Ewing ("Ewing") due process in violation of 42 U.S.C. § 1983.[1] Although as private universities *amici* would not be directly affected by this ruling, all of higher education has a strong interest in the maintenance of academic independence by public universities. Unwarranted judicial control over the academic qualifications of students at public universities lowers the quality of the national teaching and research effort and erodes the concept of academic freedom. Moreover, there are dangers for *amici* arising out of the lower court's application of its view that Ewing had a property right stemming from an express or implied contract with Michigan. Even if private universities are unconstrained by the Fourteenth Amendment, an affirmance by this Court might be construed as approving the lower court's contract theory, and thereby threaten the ability of private universities to continue to carry out their educational responsibilities without improper judicial intervention.

The *amici* hope that the analysis of these issues by private universities will be of assistance to the Court.[2]

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[1] *Ewing* v. *Board of Regents of University of Michigan*, 742 F.2d 913, 915-916 (6th Cir. 1984).

[2] Pursuant to Rule 36.2 of the Rules of this Court, both parties have consented to the filing of this brief. Copies of the written consents from the petitioner and the respondent have been lodged with the Clerk.

Statement of the Case.

At issue here is Michigan's decision to discontinue Ewing's participation in its "Inteflex Program," a combined program of undergraduate and medical education leading to the award of both the B.A. and M.D. degrees.[3] Although the event which precipitated Michigan's decision to drop Ewing from registration was his failure on the National Board of Medical Examiners Part I examination ("NBME Part I"), that event culminated six years during which Ewing repeatedly failed to meet scholastic standards. As discussed below, Michigan's final decision was based on an evaluation of his entire performance.

Ewing entered the Inteflex Program in the fall semester of 1975. In his first year, he encountered difficulty in handling the work and did not take the final examination in biology or complete the freshman seminar. 559 F.Supp. at 793. The following semester he withdrew from a psychology course, was advised that he would not be permitted to take the patient care course ordinarily taken that semester, and was placed on an irregular program. *Id.*

In July, 1976, Ewing's status was considered by the Promotion and Review Board, the faculty committee responsible for reviewing students' progress at regular intervals, passing upon students' qualifications, and imposing appropriate conditions for continued study with respect to each candidate. Petition at 4. Ewing requested, and was granted, a leave of absence. 559 F.Supp. at 793.

Ewing returned to Michigan in the winter of 1977. He experienced academic difficulty throughout the 1978-79 and 1979-80 years, received several incompletes and grades below

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[3] This factual summary is based primarily on the opinions of the courts below, and the statement of relevant facts contained in Michigan's Petition for a Writ of Certiorari ("Petition").

"C", and was again placed on an irregular program. *Id.* at 793-95. The Promotion and Review Board advised him that "any further deficiencies in the Program would be grounds for dismissal from registration." *Id.* at 795.

By the end of the 1980-81 academic year, Ewing had been in the Inteflex Program six years, but had completed only four years' work. *Id.* He had received seven incompletes, withdrawn from one course, and failed another course which he was required to repeat. On three occasions he had been placed on probation and warned that any further deficiencies could lead to his dismissal. Petition at 5.

In June, 1981, Ewing took the NBME Part I. A student must pass this examination before progressing to the clinical stage of medical study, and failure is treated as a formal deficiency by faculty review boards. Petition at 6. A score of 345 on the NBME Part I was considered passing. Ewing received a score of 235, which the district court found was "not only the lowest score in his class, but the lowest score ever recorded by a . . . Michigan student in the Part I examination." 559 F. Supp. at 794. A short time later, the Promotion and Review Board voted unanimously to drop Ewing from registration in the Inteflex Program. In a meeting with the board on July 31, 1981, Ewing acknowledged that he had been aware of the meaning of the warning letters advising him that further deficiencies would lead to his being dropped from the program but offered various explanations for his continued unsatisfactory performance. *Id.* at 796.

Ewing appealed the Promotion and Review Board's decision to the medical school's Executive Committee, which reviewed the entire record and discussed the matter with Ewing and his representatives at three meetings. The Executive Committee unanimously affirmed the decision of the Promotion and Review Board. *Id.* Petition at 8-9.

Ewing then commenced this action in the United States District Court for the Eastern District of Michigan. He sought

an order compelling Michigan to permit him to retake the NBME Part I, and alleged, *inter alia*, that Michigan's action in discontinuing his participation in the Inteflex Program denied him substantive due process in violation of 42 U.S.C. § 1983 (Count I) and breached his contractual relationship with Michigan (Count II). 559 F. Supp. at 797. Following a bench trial, the District Court found in favor of Michigan and against Ewing on all counts.

On appeal, the United States Court of Appeals for the Sixth Circuit reversed and ordered that Ewing be permitted to retake the NBME Part I and that, should he pass, he be reinstated in the Inteflex Program. 742 F.2d 913, 916.

Summary of Argument.

I.

The decision of the Court of Appeals represents an unwarranted judicial interference in matters of academic judgment and expertise.[4] Michigan's decision to drop Ewing from registration in the Inteflex Program, based on a comprehensive review of his record, is precisely the sort of academic judgment that should not be subject to judicial reexamination. *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78, 92 (1978). This Court has acknowledged that only educators possess the knowledge, experience, and expertise necessary to judge the qualifications of students. In the area

[4] The *amici* have limited their brief to the issues raised by this case which affect private universities. Accordingly, this brief does not address the issue of whether the Eleventh Amendment bars the relief ordered by the Court of Appeals, or issues raised by application of the Fourteenth Amendment to public universities.

of medical studies, judgments of academic officials concerning the qualifications of students are entitled to particular weight. Even if some limited judicial recourse is appropriate, the decision of a university to dismiss a student for academic reasons should be upheld unless the student establishes that the dismissal was devoid of any rational basis or motivated by bad faith or ill will unrelated to academic performance.[5]

The court below violated this standard. By limiting its focus to Ewing's performance on a single examination and by comparing Michigan's decision to drop Ewing from registration with decisions concerning other students with different academic records, the court below disregarded the fact that Michigan's decision was based on an evaluation of Ewing's entire record and an assessment of his individual academic performance and fitness to continue medical study. In effect, the Court of Appeals substituted its own criteria for evaluating students for that of Michigan's faculty.

The approach followed by the court below, if upheld, would diminish the ability of educators to administer the system of individual and ongoing evaluation which is vital to the educational process. Neither the interests of education nor the advantages that society derives from educational institutions would be served by the involvement of courts in reviewing on the merits a careful and deliberate academic evaluation. Moreover, judicial review on the merits leads to inefficient use of judicial and academic resources.

II.

The legal relationship between the university and its students must be viewed in light of the unique objectives of the educa-

[5] The *amici* recognize, of course, that the discretion traditionally accorded universities over academic matters does not mean that institutions may use the academic evaluation process as a pretext to engage in invidious discrimination. There is, however, no allegation of discrimination in this case.

tional process and the well-established authority of educators to determine academic qualifications. Educators must retain broad discretion to determine, in good faith, a student's fitness based upon an evaluation of the student's individual academic performance. Inherent in the teaching function is the ability to establish conditions for continued study based upon an assessment of a student's performance and potential, in the context of the demands of the particular academic program and the profession for which the student is preparing.

Insofar as a court views the relationship between the university and its students as contractual, the court's task is to determine the student's reasonable expectations concerning the conditions for continued study. Those expectations are the result of ongoing evaluation and counseling which keep students apprised of their progress and the possible consequences of unsatisfactory performance. Ewing was repeatedly warned that failure to improve would result in his being dropped from registration, and he cannot complain that he was misled or subjected to ill-considered action.

Argument.

I. THE DECISION OF THE COURT OF APPEALS CONTRAVENES THE TRADITIONAL RULE OF DEFERENCE TO UNIVERSITY OFFICIALS IN ACADEMIC AFFAIRS.

A. *Important Policy Considerations Require Respect for Decisions of Academic Officials Concerning the Qualifications of Students.*

For very good reasons, courts have respected the principle of judicial non-interference in scholastic affairs. Decisions such

as who should be admitted to an educational institution, what courses should be available, and whether academic standards have been satisfied do not involve the types of factual disputes capable of resolution by a court. To a substantial degree, such decisions involve subjective judgment by experienced professionals. Such decisions require expertise that the judiciary generally does not possess. Deference by the courts is particularly important in the area of medical studies, where decisions concerning students encompass an evaluation of clinical competence, peer and patient relations, and organizational skills, as well as the ability to master a body of knowledge and attain a standard of scholarship.[6] In weighing a candidate's fitness for continued study, medical school faculty members bring to bear the knowledge accumulated through years of professional experience in teaching, practice, and research. This experience uniquely qualifies them to make comparative judgments concerning the performance of candidates and to evaluate each student's potential for a successful career in medicine in light of the insights gained by observing former students pursue their academic program and then advance into the profession.

These policy considerations were reflected in this Court's caution in *Horowitz* that

> a judgment [whether to terminate a student's medical studies for academic deficiency] is by its nature more subjective and evaluative than the typical factual question presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade

[6] The rule of judicial nonintervention in scholastic affairs is "particularly applicable in the case of a medical school" because "[c]ourts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine [citation omitted]." *Connelly* v. *University of Vermont and State Agricultural College*, 244 F. Supp. 156, 160-61 (D. Vt. 1965).

> for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making. 435 U.S. at 90.
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> Courts are particularly ill-equipped to evaluate academic performance. The factors discussed [above] . . . speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking. *Id.* at 92.[7]

Respect for the judgment of educational officials on purely academic matters also has constitutional underpinnings. In *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), Justice Frankfurter's concurring opinion pointed out the necessity for "the exclusion of governmental intervention in the intellectual life of the university," *id.* at 262, and recognized "four essential freedoms" for an educational institution: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263.

Justice Powell's lead opinion in *Regents of University of California* v. *Bakke* echoed this position:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special

[7] See also *Gaspar* v. *Bruton*, 513 F.2d 843, 850-51 (10th Cir. 1975); *Wilkenfield* v. *Powell*, 577 F. Supp. 579, 583 (W.D. Tex. 1983); *Lightsey* v. *King*, 567 F. Supp. 645, 647-48 (E.D.N.Y. 1983); *Connelly* v. *University of Vermont and State Agricultural College*, *supra*, 244 F. Supp. at 161; *Barnard* v. *Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913).

> concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. 438 U.S. 265, 312 (1978) (opinion of Powell, J., announcing the judgment of the Court).

It need hardly be added that "selection of its student body" encompasses a university's freedom to determine the academic qualifications of students to continue study after they have matriculated.[8]

B. *The Court of Appeals Misinterpreted the "Arbitrary and Capricious" Standard.*

Guided by the foregoing considerations, courts wisely have refrained from attempting to review a university's academic assessment. Until the decision of the court below, no court had explicitly recognized a cause of action for violation of substantive due process arising out of the dismissal of a student from a university on academic grounds. Even those courts that have implied in dictum that such a cause of action exists have been unanimous in narrowly limiting the scope of judicial inquiry by requiring that the plaintiff prove that a dismissal was "arbitrary and capricious" in the strict sense: devoid of any rational basis or motivated by bad faith or ill will. See, e.g., *Horowitz*, 435 U.S. at 90-92; *Stevens* v. *Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981); *Gaspar* v. *Bruton, supra*, 513 F.2d at 850-851; *Connelly* v. *University of Vermont and State*

[8] Scholars agree that there are sound constitutional and policy reasons for judicial deference to academic expertise in such matters. See, e.g., Wright, "The Constitution on the Campus," 22 Vand. L. Rev. 1027, 1070 (1969); "Developments in the Law — Academic Freedom," 81 Harv. L. Rev. 1045, 1139, 1152 (1968).

Agricultural College, supra, 244 F. Supp. at 161.[9] The court below, although paying lip service to the arbitrary and capricious standard, proceeded to ignore the substance of what Michigan had done and to substitute its review for Michigan's.

No one contests that Ewing's dismissal from Michigan's Inteflex Program was based upon a good faith evaluation of his entire academic record, and that nonacademic factors played no part in Michigan's decision. When these facts exist, there is no need for further judicial inquiry.[10]

In resting its decision on the fact that other students were allowed a second opportunity to pass the NBME Part I, the Court of Appeals disregarded entirely the essential nature of Michigan's action: a thorough review of Ewing's performance during his six years of study and a conclusion based on his complete record — including Ewing's receipt of the lowest score ever recorded on the NBME Part I by a University of Michigan medical student — that he was not qualified to continue medical studies. The premise of the Sixth Circuit's deci-

[9] Even commentators who argue that academic dismissal may give rise to a cause of action for violation of substantive due process accept the "arbitrary and capricious" standard and define that standard to require proof that the university's decision was based on other than academic considerations. See, e.g., Dassem, "*Board of Curators of the University of Missouri* v. *Horowitz*: Academic Versus Judicial Expertise," 39 Ohio State L.J. 476, 484 (1978).

[10] Without disturbing the trial court's finding that Michigan's decision was based solely on academic considerations and was not motivated by bad faith or ill will, the Court of Appeals concluded that Michigan was arbitrary and capricious because it failed in Ewing's circumstances to follow its past practice of allowing other students a reexamination. 742 F.2d at 915-916. In so holding, the appeals court did not attempt to distinguish prior caselaw interpreting the "arbitrary and capricious" standard as requiring a showing that the university's decision was irrational or based on nonacademic factors. Nor did the appeals court discuss Ewing's record of academic deficiencies, the Promotion and Review Board's warnings that further deficiencies could result in dismissal, the fact that Ewing failed the NBME Part I while on academic probation, or the fact that both the Promotion and Review Board and the Executive Committee based their decisions on thorough evaluations of Ewing's entire record.

sion is that because Ewing was "qualified" to sit for the NBME Part I examination, Michigan was arbitrary in denying him permission to repeat the examination, while providing that opportunity to other "qualified" students. 742 F.2d at 916. Such an approach misperceives the academic evaluation process and would substitute mechanical rules for student-by-student evaluation. No two students are identical. The fact that two students may be in "good standing" or "qualified" to sit for an examination by no means suggests that their academic records, or the conditions of their continued enrollment, are the same or even similar.

In the instant case, Ewing was "qualified" only in the sense that he was eligible to take the NBME Part I. His record was marked by failing, marginal or incomplete work, probations, leaves of absence, and warnings from the Promotion and Review Board that failure to improve could result in dismissal. Faced with this cumulative record of deficiencies, any of the *amici* institutions which administer the NBME Part I could reasonably have concluded that his abysmal failure on that exam was "the straw that broke the camel's back" (J.A. 79). In each case, that decision would be based on the student's total record, and not the NBME Part I results viewed in isolation.

In effect, the Court of Appeals substituted its own judgment concerning the proper criteria for continued participation in the Inteflex Program for that of the medical school faculty, and determined that a passing grade on the NBME Part I should entitle a student to continued participation, regardless of other qualifications or deficiencies. However, educators, and not judges, are qualified to make these decisions, and courts have traditionally left these decisions to educators. *Hines* v. *Rinker*, 667 F.2d 699, 704 (8th Cir. 1981). Judgments concerning academic performance should continue to rest with experienced university personnel.

C. *If Affirmed, the Decision Below Would Have Harmful Educational Consequences.*

If allowed to stand as a model, the mechanical approach taken by the Court of Appeals would curtail the ability of academics to use informed judgment on a case-by-case basis when making decisions about students. Students and ultimately the public would inevitably suffer the consequences. The discretion traditionally accorded academic promotion and review boards enables them to monitor each student's progress and tailor appropriate conditions for students encountering difficulty. In the case of medical education, this discretion, placed in the hands of professionally qualified people, is especially vital because training is complex and school officials are mindful that graduates will engage in medical practice and research and thereby have considerable responsibility for the health and safety of others.

If the lower court's approach were followed, educators would be inhibited, for example, from allowing generally capable students who temporarily fall below academic standards from continuing their studies, lest they lose the prerogative to terminate chronically deficient students. Where a student with an otherwise satisfactory record fails a course or examination, continued enrollment may well be appropriate. Where a different student with a record of repeated deficiencies fails the same course, however, probation or dismissal may be warranted.

A student's fitness to continue studies, and the conditions upon which he or she may do so, must be determined on an individual basis by experienced university officials. A medical school's decision concerning one student should not be dictated by its decision concerning another student. Nor should promising students be penalized by the application of inflexible rules that do not take into account all aspects of a student's abilities and potential. The approach taken by the Court of

Appeals would tie the hands of university officials charged with the responsibility both of maintaining high academic standards and assisting competent students to complete their academic programs. See *Giles* v. *Howard University*, 428 F. Supp. 603, 606 (D.D.C. 1977).

The tradition of judicial deference to academic expertise in the educational process has contributed to one of the finest systems of medical education in the world. That system will be jeopardized if courts cease to respect the judgments of educators in strictly academic matters.

D. *Efficient Use of Judicial and Academic Resources Requires Strict Application of the "Arbitrary and Capricious" Standard.*

The district court ultimately reached the correct result concerning Ewing's claims of denial of due process and breach of contract. It did so, however, only after lengthy discovery and a full trial in which Ewing attempted to compare his performance to that of other students in both the Inteflex and standard medical education programs.

Such protracted proceedings were not called for in this case, and should not be called for in the vast majority of cases involving academic decisions. Proper application of the "arbitrary and capricious" standard should enable courts to dispose of most challenges to academic decisions on motions for summary judgment. If a case is properly in court at all, interference with the university's decision is not warranted unless the plaintiff can prove that the decision was devoid of any rational basis or motivated by bad faith or ill will. Ordinarily, the court should be able to decide soon after the action is filed whether the plaintiff has any prospect of meeting this rigorous standard.

Use of summary judgment to resolve actions concerning academic decisions is conducive to the efficient use of scarce

judicial resources. It also recognizes that limits should be placed on the demands made of faculty members who generally will have spent many hours, if not days, on internal university reviews by the time a student files suit. If the plaintiff cannot make a prima facie showing that the university was motivated by personal considerations unrelated to academic performance, the complaint should promptly be dismissed.

II. The Appeals Court's Contract Analysis Ignores the Unique Nature of the University-Student Relationship.

The Court of Appeals held that a property interest protectible under the due process clause arose from the contractual relationship between Ewing and Michigan. The court's analysis, however, ignores the fundamental distinction, well-established in caselaw, between an ordinary commercial contract and the special legal relationship of an educational institution and its students in academic matters.

While the law of contracts sometimes provides a useful framework for analysis of the university-student relationship, "[t]his does not mean that 'contract law' must be rigidly applied in all its aspects . . . The student-university relationship is unique, and it should not and can not be stuffed into one doctrinal category." *Slaughter* v. *Brigham Young University*, 514 F.2d 622, 626 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975).[11] Accordingly, educators have traditionally been ac-

[11] One commentator has observed: "[T]he contract theory seems to misrepresent the intentions of the parties involved. Despite the incorporation of contractual terms in institutional publications, it appears unlikely that either administrators or students view their day-to-day relations as governed by a formal contract." "Developments in the Law — Academic Freedom," 81 Harv. L. Rev. 1045, 1147 (1968).

corded discretion to determine the academic fitness of students within the context of the university-student contractual relationship. *Jansen* v. *Emory University*, 440 F. Supp. 1060 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978), illustrates the breadth of this discretion. In upholding the university's dismissal of a fourth year dental student, the court observed:

> This Court's decision need not and should not be controlled by a mechanistic application of the law of contract. *Mahavongsanan* [v. *Hall*, 529 F.2d 448 (5th Cir. 1976)] recognizes that educational contracts have unique qualities and are to be construed in a manner which leaves the school sufficient discretion "to properly exercise its educational responsibility." [Citation omitted] 440 F. Supp. at 1062.
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> As long as the decision to dismiss Jansen was essentially academic and neither alleged nor shown to be a pretense to punish him for disciplinary infractions, it is not subject to judicial review as a breach of the educational contract. *Id.* at 1063.

Moreover, unlike other contracts, the terms of the educational relationship are not defined in a formal, integrated agreement. In seeking to determine the intent of the parties, the courts have held that "the standard is that of reasonable expectation — what meaning the party making the manifestation, the University, should reasonably expect the other party to give it." *Giles* v. *Howard University*, 428 F. Supp. 603, 605 (D.D.C. 1977). Accord: *Cloud* v. *The Trustees of Boston University*, 720 F.2d 721, 724 (1st Cir. 1983); *Lyons* v. *Salve Regina College*, 565 F.2d 200, 202 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978).

In certain areas of university life, such as the financial obligations of students, close textual analysis of statements in catalogues may lead to an understanding of a student's "reasonable expectation" and therefore to a definition of the university's obligations. For example, universities may not, absent an express reservation, deviate from the tuition rates stated in their bulletins since this is "one of the most business-like aspects of the student-college relationship, and it is one area where both parties are most likely to expect the stated rules to be binding."[12] Similarly, courts have required universities to follow particular disciplinary procedures set forth in official bulletins, since enforcement of stated procedures does not involve judicial reassessment of expert academic judgments.[13]

By contrast, the courts have repeatedly refused to use isolated passages from catalogues and bulletins to limit colleges' and universities' discretion over academic qualifications. See, e.g., *Hines* v. *Rinker*, *supra*, 667 F.2d at 702-04; *Watson* v. *University of South Alabama College of Medicine*, 463 F. Supp. 720, 726 (S.D. Ala. 1979); *Abrams* v. *Illinois College of Podiatric Medicine*, 77 Ill. App. 3d 471, 395 N.E. 2d 1061, 1065 (1979); *Abbariao* v. *Hamline University School of Law*, 258 N.W.2d 108, 113-14 (Minn. 1977). Indeed, a university whose catalogue reserves to its faculty or administration broad discretion regarding academic advancement of students may foreclose a student from continuing in a graduate program even where the student's grade point average is above the minimum necessary for promotion.[14] The reason for this

[12] Jennings, "Breach of Contract Suits By Students Against Postsecondary Education Institutions: Can They Succeed?," 7 J. Coll. & Univ. L. 191, 220 (1981).

[13] See, e.g., *Tedeschi* v. *Wagner College*, 49 N.Y.2d 652, 404 N.E.2d 1302 (1980); *Kwiatkowski* v. *Ithaca College*, 82 Misc. 2d 43, 368 N.Y.S.2d 973, 980 (Sup. Ct. 1975).

[14] *University of Miami* v. *Militana*, 184 So.2d 701 (Fla. Dist. Ct. App.), *cert. denied*, 192 So.2d 488 (Fla. 1966). See also *Balogun* v. *Cornell University*,

distinction lies in the nature of the student-teacher relationship. In academic matters, a student's expectation is based on a particularized and ongoing type of performance evaluation. Responsible faculty members carefully monitor each candidate's performance and inform the student at regular intervals of his or her progress and qualification for continued study. This ongoing performance evaluation reflects most accurately the student's "reasonable expectation."

It is obvious, in light of these considerations, that the University of Michigan did not breach any contractual obligation to Ewing. Ewing "encountered immediate difficulty" upon entering the Inteflex Program. 559 F. Supp. at 793. By the time of the NBME Part I, he had required six years to complete the course work normally completed in four, failed several courses, received seven incompletes, taken two leaves of absence, been placed on academic probation three times, and been warned repeatedly that any further deficiencies could lead to his dismissal. Under the circumstances, there is no basis to conclude that Michigan led Ewing to believe that he had an unqualified right to retake the NBME Part I.

In fact, just the reverse is true. Ewing continued his enrollment after having been advised that any additional deficiency could result in his dismissal. Ewing cannot claim a reasonable expectation of a right to retake the NBME Part I when at the time he took the exam he was on notice that he was liable to be dropped from registration if he did not improve his performance. Whatever the prior practice may have been with regard to other students, the "contract" between Ewing and Michigan, carried out through the system of periodic counseling and evaluation, reflected the understanding that unsatisfactory

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70 Misc. 2d 474, 333 N.Y.S.2d 838 (Sup. Ct. 1971); *Sofair* v. *State University of New York*, 54 A.D.2d 287, 388 N.Y.S.2d 453 (1976), rev'd on other grounds, 44 N.Y.2d 475, 377 N.E.2d 730, 406 N.Y.S.2d 276 1978).

performance on the NBME Part I could result in removal from the Inteflex Program.

Affirmance of the Sixth Circuit's decision would open the courtroom door to any deficient student alleging that the university's evaluations of some other students impliedly established a minimum standard of performance which the university violated in its treatment of the plaintiff. Such an argument, if permitted as a basis for a breach of contract claim, would embroil the courts in detailed comparison between the plaintiff's academic and personal qualifications and the qualifications of other students in similar programs of study.

Finally, even if the statement in the Michigan promotional brochure concerning reexamination were interpreted literally and given great weight,[15] it would not establish that Michigan breached any terms of its "contract" with Ewing. The pamphlet stated that "qualified medical students" would be given an opportunity to make up a failure on a National Board examination (J.A. 113). Ewing, however, ceased to be "qualified" because of his performance on the NBME Part I. Having been placed on probation and warned that unsatisfactory performance on that examination could be fatal to his continued enrollment, he received a grade so far below passing as to demonstrate that he had only marginal ability in the "hard sciences." (J.A. 72-73).[16]

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[15] The Court of Appeals stated that the brochure was important because irrespective of whether Ewing saw it before taking the NBME Part I, "this pamphlet memorialized the consistent practice of the medical school with respect to students who initially fail that examination." 742 F.2d at 916. However, the evidence showed that students at Michigan had not been allowed to retake the NBME Part I if they had been issued a warning about further deficiencies or were already on probation (J.A. 153).

[16] Ewing's argument that the word "qualified" refers only to the student's status prior to taking the NBME Part I makes no sense. Under Ewing's interpretation, all students who were eligible to take the initial examination would automatically be entitled to reexamination. If the sentence limiting reexamina-

The net effect of affirming the Sixth Circuit's decision would be to increase the judicial role in reviewing academic decisions. Here, as in *Horowitz*, this Court should decline the respondent's invitation to "further enlarge the judicial presence in the academic community." 435 U.S. at 90.

Conclusion.

For the reasons set forth above, the judgment below should be reversed, and the case should be remanded with instructions to enter judgment in favor of the petitioner.

Respectfully submitted,

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June 7, 1985

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tion to only "qualified" students is to have any meaning, it must necessarily be interpreted to take account of a student's performance on the NBME Part I.